In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 201

WILLIS SHAW FROZEN EXPRESS, INC., APPELLANT

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

This memorandum is submitted in order to state the reasons why the government believes that, although the district court correctly decided this case, the questions presented by the appeal warrant plenary consideration.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. 25-26)[1] dismissing

[1] The district court, on March 8, 1963, denied appellant's motion for rehearing or reargument (J.S. 27).

appellant's complaint which sought to set aside a report and order of the Interstate Commerce Commission (J.S. 28-43) partially denying appellant's application for "grandfather" motor carrier authority under Section 7(c) of the Transportation Act of 1958 (72 Stat. 573).

Section 7(a) of the Transportation Act of 1958 (72 Stat. 573) amended the so-called agricultural commodities exemption of Part II of the Interstate Commerce Act to subject to economic regulation [2] the transportation by motor vehicle in commerce of "frozen fruits, frozen berries, frozen vegetables" and certain other listed commodities.[3] A Commission certificate or permit authorizing the transportation of such commodities is now required under Part II of the Act. However, a "grandfather" provision—Section 7(c) of the 1958 Act—provided that upon time-

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[2] Prior to the 1958 Act, the so-called agricultural commodities exemption in Section 203(b)(6) of the Interstate Commerce Act (49 U.S.C. 303(b)(6)) exempted from economic regulation motor vehicles carrying agricultural commodities "not including manufactured products thereof". Although the Commission had ruled that frozen fruits, berries and vegetables were not exempt from economic regulation under this provision, court decisions beginning in 1948 had extended the exemption to commodities, such as these frozen foods, which had "received varying degrees of commercial processing". See H. Rep. 1922, 85th Cong., 2d Sess., pp. 15-16.

[3] The other commodities whose transportation was specifically made subject to the Act were cocoa beans, coffee beans, tea, bananas, hemp, imported wool, wool tops and noils, and wool waste which had been carded, spun, woven or knitted. The exemption of frozen or fresh sea food was confirmed and was extended to breaded cooked fish or shell fish (*id.*, p. 17).

ly application the Commission should "without further proceedings" issue a certificate or a permit to any person who on May 1, 1958, and thereafter [4] was "in bona fide operation . . . in the transportation of property for compensation by motor vehicle" made subject to economic regulation by the 1958 Act.

On December 5, 1958, appellant sought "grandfather" rights pursuant to Section 7(c) for the motor transportation, as a common carrier, of frozen fruits, frozen berries, frozen vegetables and other frozen foods such as poultry and sea food, the transportation of which (when not mixed with regulated commodities) is still exempt from the Act, non-radially over irregular routes between all points in 35 States.[5]

The Commission authorized the issuance of a certificate of more limited scope than that requested by appellant (J.S. 37-39).[6] It awarded authority for

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[4] Section 7(c) recognizes two modifications of May 1, 1958, as the critical date on and after which the "bona fide operation" must have been conducted. These are: (1) operations involving "seasonal service only" and (2) "interruptions of service over which" the applicant "had no control". Appellant did not rely on these nor are they applicable here.

[5] The States were Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington and Wisconsin.

[6] In his report the hearing examiner had recommended a broader grant of authority than ultimately awarded by the Commission, although less than sought by appellant (J.S. 53-54). See *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 364.

the transportation of frozen fruits, frozen berries and frozen vegetables from any point in California, Oregon and Washington to any point in Arkansas, Kansas, Missouri and Oklahoma, as well as authority to transport certain of these commodities from origins in six other states to destinations in seven other states (J.S. 38). Additionally, the Commission authorized the transportation at the same time of frozen fish in mixed shipments with frozen fruits, berries or vegetables from designated West Coast points to points in seven States (J.S. 38-39). The three-judge district court held the Commission had "correctly employed the statutory standards prescribed" in Section 7(c) of the Transportation Act of 1958, and sustained the Commission's disposition of the appellant's application (J.S. 25-26).

ARGUMENT

Appellant's was one of 950 applications for "grandfather" rights under Section 7(c).[7] In cases involving the issues presented in this appeal or related issues, three-judge district courts have reviewed ten Commission dispositions of "grandfather" applications under Section 7(c) of the Transportation Act of 1958. In five such cases, in addition to the case at bar, the Commission was sustained.[8] In three cases

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[7] Interstate Commerce Commission, Supplement to the Seventy-Fifth Annual Report, p. 33 (1963).

[8] *Home Transfer & Storage Co.* v. *United States*, C.A. No. 62-297, D. Oreg., October 22, 1963, sustaining *Home Transfer & Storage Co.*, 88 M.C.C. 223 (1961); *Northwest Fisheries*

decided after the filing of appellant's Jurisdictional Statement, the district courts reversed and remanded the cases to the Commission for further consideration.[9] These cases evidence a continuing uncertainty as to the proper interpretation and application of Section 7(c). Accordingly, while we believe the decision below was correct, we cannot say that the questions "are so unsubstantial as not to need further argument" (Rule 16(1)(c)). We therefore do not oppose the notation of probable jurisdiction.

The statutory standard governing grandfather rights under Section 7(c) is "bona fide operation on

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Transp., Inc. v. *United States*, C.A. No. 5481, W.D. Wash., May 17, 1962, sustaining *Northwest Fisheries Transp., Inc.*, 89 M.C.C. 324 (1961); *Olmsted* v. *United States*, C.A. No. 5480, W.D. Wash., May 17, 1962, sustaining *Refrigerated Truck Lines*, 86 M.C.C. 377 (1961); *Consolidated Freightways Corp.* v. *United States*, C.A. No. 40438, N.D. Cal., May 3, 1962, sustaining *Consolidated Freightways Inc.*, 84 M.C.C. 637 (1961); *Battaglia* v. *United States*, C.A. No. 61-321, D. Oreg., March 29, 1962, sustaining *Produce Transport Dispatch*, 84 M.C.C. 451 (1961). A *per curiam* opinion sustaining the Commission was filed in each of these cases and they are unreported.

[9] *Hale Distributing Co.* v. *United States*, C.A. No. 62-88-S, S.D. Cal., July 8, 1963; *Frozen Food Express* v. *United States*, C.A. No. 9250 N.D. Tex., July 9, 1963; *J. Edward Jarman* v. *United States*, C.A. No. 13692, D. Md., June 18, 1963, reversing and remanding, respectively, the Commission's report and orders in *Hale Distributing Co. Common Carrier Application*, 89 M.C.C. 361 (1961), *Frozen Food Exp. Common Carrier Application*, 89 M.C.C. 555 (1961), and *Jarman Common Carrier Application*, 84 M.C.C. 343 (1961). See also *Winter Garden Company* v. *United States*, 211 F. Supp. 280 (E.D. Tenn.).

May 1, 1958 . . . and * * * since that time." Such operations must be actual and substantial, not merely potential.[10] The case presents three problems as to the scope of authority warranted by the evidence of past operations.

1. The Commission, in determining the scope of the appellant's past bona fide operations, did not deem frozen fruits, frozen berries and frozen vegetables to comprise a single commodity class (as appellant argues), but three distinct classes. It therefore declined to award appellant "grandfather" authority to transport each of the three classes except to the extent that it showed that it had handled the particular class from and to points within the considered areas.

Appellant urges that frozen fruits, frozen berries and frozen vegetables are merely "sub-categories of a single class of commodities," namely, "the frozen foods made subject to regulation by Section 7(a) of the 1958 Act," that they have "identical transportation characteristics and requirements," and that "any failure [by it] actually to transport frozen commodities in all three of these overlapping categories between any given pair of points was more a matter of chance than of choice." (J.S. 12) This view was adopted by another district court in the *Winter Gar-*

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[10] *Noble* v. *United States*, 319 U.S. 88, 93; *United States* v. *Carolina Carriers Corp.*, 315 U.S. 475, 489-90; *Alton R. Co.* v. *United States*, 315 U.S. 15, 24.

den case.[11] On the other hand, the Commission's approach has been sustained by three district courts in addition to the court below.[12]

2. The Commission regarded shipments prior to January 1, 1957, as "too remote" from the "grandfather" date, May 1, 1958, for consideration in determining the scope of appellant's bona fide operations on such date (J.S. 33). The appellant had introduced abstracts of records covering shipments from May 3, 1954, and it contends that "the Commission's refusal to consider any evidence prior to January, 1957, less than two full growing seasons prior to the May 1, 1958, date specified in the statute, is flatly erroneous" (J.S. 13). Two cases have reversed the Commission's rejection of pre-1957 shipments on the ground that a single season's operations were not sufficiently repre-

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[11] *Winter Garden Company* v. *United States, supra*, at 289. In *Frozen Food Express* v. *United States, supra*, the court said, "While the language of the Act may not foreclose a fact issue on this matter, there is nothing in such language indicating that these commodities *must* be treated as one class."

[12] *Northwest Fisheries Transp., Inc.* v. *United States, supra*, *Consolidated Freightways Corp.* v. *United States, supra*, *Battaglia* v. *United States, supra*.

In *United States* v. *Carolina Carriers Corp., supra*, upon which appellant relies, the Court held that an applicant carrier was entitled to grandfather rights as a general commodity carrier if he had transported representative shipments of that recognized class. Here, the Commission properly regarded each of the 11 categories listed in Section 7(c) as a separate commodity class, and, therefore, representative shipments of each must have been transported as a prerequisite to a grant of grandfather rights.

sentative of the applicant's actual business.[13] The court below upheld the Commission's limitation of proof. We believe that the use of the time limitation is sanctioned by the statute (see, also, *Alton R. Co.* v. *United States*, *supra*, 315 U.S. at 23) and afforded an appropriate measure of applicant's actual operations.

3. This case also involves a third point, not common to the other court cases, *supra*, under Section 7(c). The Commission granted appellant authority to transport certain commodities still exempt from regulation, *i.e.*, frozen fish and seafood, in the same vehicle with frozen fruits, berries or vegetables but only from certain west coast port origins (J.S. 39). Appellant contends that the requirement that the mixed shipment originate at a port prevents it from initiating "mixed shipments at the inland points where the 'mixing' could normally be expected to occur" and that the Commission has effectively destroyed its pre-existing ability to handle mixed shipments (J.S. 16, 18). The Commission's grant of authority, however, was in substantial conformity with the showing made of actual prior operations in which the loading of frozen fruits, berries and vegetables occurred at or near the port where the fish was loaded.

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[13] *Winter Garden Company* v. *United States*, *supra*; *Frozen Food Express* v. *United States*, *supra*.

CONCLUSION

Although we believe that the decision below is correct, we do not oppose the notation of probable jurisdiction.

Respectfully submitted.

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